IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

(1) INCOME TAX APPEAL No. 40 of 2003

C I T UDAIPUR
V/S
M/S KANHAIYALAL

(2) INCOME TAX APPEAL No. 42 of 2003

C I T UDAIPUR
V/S
M/S KANHAIYALAL SARUPARIA

Mr. KK BISSA, for the appellant / petitioner

Mr. SANJEEV JOHARI, for the respondent

Date of Order : 13.12.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

ORDER

REPORTABLE

These two appeals seek to challenge the order of the ITAT dated 30th October 2001, deciding two appeals of the assessee, for the assessment years 1987-88 and 1988-89, and thereby setting aside the penalty imposed by the Assessing Authority, and upheld by the CIT (Appeals), which was imposed under Section 271(1)(c).

These appeals were admitted on different dates.

However, the question framed in appeal no.40/03 is as under:-

> "Whether in the facts and circumstances of the case, keeping in view that the assessee in his statement under Sec. 132(4) has agreed to surrender undisclosed income of Rs.3,50,000/- for assessment year 1987-88, the Tribunal was right in holding that the assessee was entitled to claim the benefit of immunity from levy of penalty under Exception-V of Sec.271(1)(c) notwithstanding that the assessee has not surrendered his undisclosed income for the assessment year 1987-88 but has spread over the same for 5 years."

While the appeal No.42/03 was admitted on 15.9.2003, by framing the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case the ITAT was correct in its interpretation of Explanation 5 to Section 271(1)(c) so as to hold that penalty u/s 271(1)(c) was not leviable in the case, contrary to the findings given by CIT (A)?"

In our view, the precise question that emerges is, about interpretation of the Explanation 5 to Section 271(1)(c), as to whether on the face of the statement given by the assessee under Section 132(4), any liability of penalty is attracted, on account of the assessee filing revised

returns for the assessment years 1984-85 to 1988-89, showing the income disclosed under Section 132(4) by spreading it over the aforesaid assessment years. The assessing authority, accepting the revised returns, has made the assessment, though by changing the figures. For the present purposes, it would suffice to say, that out of the amount of Rs.3,50,000/- disclosed under Section 132(4), income of Rs.1,05,000/- has been assessed for the assessment year 1987-88, and another sum of Rs.1,25,000/- has been assessed for the assessment year 1988-89, and the remaining amount of Rs.1,20,000/- has been assessed in the other three assessment years. The matter of other three assessment years is not in question.

The Assessing Authority initiated penalty proceedings after show cause notice under Section 274 read with Section 271(1)(c), calling upon the assessee, as to why penalty should not be imposed under Section 271(1)(c).

It was found by the assessing authority, that even though the department had accepted the spreading over of the income in the given assessment years, but then, the assessee has resiled from his earlier stand, [taken in the statement given under Section 132(4)] only with a view to reduce the tax liability, inasmuch as, in the statement under Section 132(4), he had offered the entire income of Rs.3,50,000/- for taxation in the assessment year 1987-88,

and thus, it was found, that it was a case of concealment, made out under Section 271(1)(c), and three times the amount of tax, being the maximum imposable penalty, has been imposed, for each of the two assessment years.

In appeal, the learned Commissioner found, that the immunity from the penalty under Section 271(1)(c) is available, if the four conditions mentioned in para 7 of the order are satisfied, being firstly, if during the course of search, the assessee gives a statement under Section 132(4) admitting that the available funds were acquired out of his undisclosed income, second being that the return of income under Section 139(1) will be furnished, third being the manner in which the income has been derived will be stated, and last being that the tax and interest on the income disclosed is paid. With enumerating these conditions, it was found, that in the statement under Section 132(4) he had admitted, that certain assets were acquired by undisclosed income, relating to the assessment year 1987-88, but then, the amount was spread over for 5 years, to avoid higher rate of tax, which would have been applicable, if the entire surrendered amount was taxed in the year 1987-88. Thus, the assessee has not stuck to the statement given under Section 132(4), and consequently, the penalty order was upheld.

Then in further appeal, the learned Tribunal

found, that the assessee had submitted revised returns for the assessment years 1984-85 to 1988-89, on the basis, that such income [as disclosed under Section 132(4)] did pertain to the said years, and that, this stand of the assessee was accepted by the Assessing Officer, in view of the fact, that the documents found during the course of search indicated, that the assessee is carrying on business from assessment year 1984-85, and the quantum of the income declared by the assessee in each year was varied by him, on estimate basis, and thus, it was clear, that as a matter of fact, the concealed income of Rs.3,50,000/- was earned during the 5 years, which was accepted by the department, and that being the position, it cannot be said, that assessee did not stick to the statement given under section 132(4). The learned Tribunal also relied upon a judgment of Allahabad Bench of the Tribunal, in the case of Shyam Biri Works (P) Ltd. Vs. ACIT, reported in 70 TTJ 880, wherein also the assessee had disclosed large amount of undisclosed income in the statement under Section 132(4), and later on filed revised returns for two years, declaring additional income, which formed part of undisclosed income, and on these facts, the Tribunal held, that the assessee was still entitled to immunity under clause (2) of Explanation 5 to Section 271(1)(c), in respect of such additional income. With this, it was held, that the learned CIT (Appeals) was not justified in holding, that the assessee lost the immunity available under clause (2) of Explanation 5 to

Section 271(1)(c), and thus, the penalty order was set aside.

We may gainfully quote the provisions of Section 132(4), alongwith the Explanation appended thereto, which reads as under:-

> "(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.
>
> [*Explanation.* For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.]"

Likewise, we may also quote the provisions of the Explanation 5 to Section 271, which reads as under:-

> "[Explanation 5.Where in the course of a [search initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [unless,

(1) such income is, or the transactions resulting in such income are recorded,

(i)in a case falling under clause (a), before the date of the search ; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the [Chief Commissioner or Commissioner] before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.]”

We may also quote the provisions of Section 271 (1), which reads as under:-

> **271.** (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person
>
> (*a*) [* * *]
>
> (*b*) has failed to comply with a notice [under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or] under sub-section (1) of section 142 or sub-section (2) of section 143 [or fails to comply with a direction issued under sub-section (2A) of section 142], or
>
> (*c*) has concealed the particulars of his income or [* * *] furnished inaccurate particulars of such income, or
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> (*d*) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits,
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> he may direct that such person shall pay by way of penalty,
>
> (*i*) [* * *]
>
> (*ii*) in the cases referred to in clause (*b*), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure;
>
> (*iii*) in the cases referred to in clause (*c*) or clause (*d*), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income [or fringe benefits."

With quoting the above provisions, we may recapitulate, that it is not in dispute, that the assessee, during the course of search, gave statement under Section 132(4), making discloser of an undisclosed income of

Rs.3,50,000/-, and giving out, that he will file return with respect to that amount, for the assessment year 1987-88. It is also not in dispute, that thereafter the assessee filed the revised return for the assessment years 1984-85 to 1988-89, and did spread over the said undisclosed income of Rs.3,50,000/- in different years. It is also not in dispute, that assessment on the basis of the said revised returns was made by the Assessing Authority, not accepting the spreading as returned by the assessee, but reshuffling the spreading, on his own estimates, of the Assessing Authorities, but then confined to a total amount of Rs.3,50,000/-, spread over the assessment years i.e. 1984-85 to 1988-89, that has also become final, as that was done in the year 1991.

It is thereafter, that the penalty proceedings had been initiated, with respect to the assessment years 1987-88, and 1988-89 only, and the income assessed for these two years, pursuant to the revised assessment order is Rs.1,05,000/- and Rs.1,25,000/- respectively. In this background, a look at the Explanation 5 again, would show, that it provides, that where in the course of a search initiated under Section 132, the assessee is found to be owner of any assets mentioned therein, and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income, <u>for any previous year</u>, which has ended before the date of search, but the

return of income for said year, has not been furnished before the said date, or where such return had been furnished before the said date, such income has not been declared therein, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall for the purpose of imposition of penalty under sub-section (1)(c) be deemed to have concealed the particulars of his income, or furnished inaccurate particulars of income.

Significantly, such concealed income could be for any previous years, and could be required to be disclosed in such particular previous years. It is to this language of Explanation 5, that two exceptions are carved out, by using the word "unless", and the controversy in the present case is covered by sub-clause (2), which has been quoted above, and which provides, that it would be not so treated the undisclosed or concealed income, if assessee, in the course of search, makes a statement under Section 132(4), that any asset found in his possession or under his control has been acquired out of his income, which has not been disclosed so far in his return of the income to be furnished before the expiry of the time specified in sub-section (1) of Section 139, and also specifies in the statement, the manner, in which such income has been derived, and pays tax, together with interest, if any, in respect of such income.

Thus, it is clear that the immunity flowing from the discloser according to Section 132(4) is provided by this clause (2) of Explanation 5 to Section 271(1). Therefore, it is to be examined, as to what is the extent of immunity provided and/or, as to whether this provision contemplates any circumstances, which may have the effect of taking away the immunity. It should be clarified that Section 132(4) by itself does not provide any immunity, rather it provides, that the statement given under that sub-section can be used as evidence in any proceedings under the Income Tax Act.

On a plain reading of the said sub-clause (2), we may immediately observe that it doesn't provide any eventuality in which the immunity conferred by this clause may be taken away, or may be lost, except where the assessee fails to pay tax, together with interest, if any, in respect of such income. It is clear from the language of said clause (2) that it does not contemplate the requirement of the assessee paying tax, together with interest, if any, in respect of such income, in any particular assessment year only. In the present case in view of the fact that the assessments for these years have been finalised, and tax, together with interest, if any, in respect of such income has been paid, it cannot be claimed that the immunity is lost, simply because of the spreading

of the income over more years. Taking any other view would amount to reading words in the clause (2), which do not exist, and according to the settled legal position regarding the interpretation of statutes, this is not permissible for us to so read. Then the other thing to be seen is, as to whether this sub-clause (2) confers any immunity or not. Admittedly, the assessee had given the statement under Section 132(4) disclosing to be having undisclosed assets worth Rs.3,50,000/-, of course in addition, he gave out therein that he would show it in the returns for the assessment year 1987-88. But then in the language of Section 132(4) read with sub-clause (2) of Explanation 5, this is nowhere the requirement, that the assessee should undertake to show that asset, in a return of any particular assessment year, to be entitled to claim the immunity.

To appreciate this aspect, we may again revert to the opening part of Explanation 5, which attracts the liability under Section 271(1) by providing Explanation, and clause (a) thereof clearly contemplates a situation, where the assessee may claim the undisclosed assets to have been acquired by him for any previous year, which has ended before the date of search, but the return of the income of such year has not been furnished before the said date. Further significantly, it is clause (b), which provides for the other eventuality, of the asset having been acquired by

him for any previous year, which is to end on or after the date of search. This is a million dollar distinction. Inasmuch as, in cases covered by clause (a), the asset may have been acquired by income for any previous year, which cannot be confined to any one previous year, for the relevant assessment year, of which previous year, the assessee may have deposed under Section 132(4), to be submitting the return. Obviously, such assets may have been acquired as or from the income for any one or more number of previous years, within the block period. Thus, when the parent provision contemplates the income to be permissible in any previous year/s, obviously the clauses (1) and (2), which are in the nature of proviso to this Explanation, have to be read in line therewith, and therefore, if the discloser of the asset has been made, then the assessee cannot be prohibited from showing that the income related to any one or more of the previous years before the date of the search, at the pain of the immunity conferred by clause (2) of Explanation 5 being taken away.

We may consider the things from yet another aspect, viz., that under the set up of Income Tax Act, in whatever eventuality the assessment may have to be made, i.e. whether a regular assessment, or assessment consequent upon escapement of income, or assessment of a block period, but in either case, the assessment has to be, with respect to the particular assessment year, relating to the

concerned previous year, and the income derived, or found by the department to have been derived, or earned, by the assessee, during particular previous year, has to be assessed during the relevant assessment year only, and assessment of such income cannot be shifted to any other past or future years, so much so that there may be cases, where the right of the department to assessment may have been lost on account of passage of limitation also.

If considered from that stand point, the assessee may have derived income in sequence of years, which might be voluminous income, and be taxable, and he may not have furnished returns at all, then a search may be undertaken under Section 132, and in that event, may be for purchasing piece, or may be due to good sense prevailing on the assessee, he may straightway make a discloser of all existing assets under Section 132(4), disclosing to be in possession of the assets as found, which by virtue of the covering language of Explanation 5 would amount to the concealment of the income for the purpose of Section 271(1)(c), but then, the Clause (2) being in nature of proviso, would come in, and in that event, obviously, the assessee would be not only entitled, rather would be under obligation to make discloser of the income earned during the relevant previous years, in which the income may have been earned, resulting into the disclosure of the total assets as acquired by undisclosed income, and admitted in

statement under section 132(4).

This may be a question of fact, as to whether the particular extent of income shown by the assessee in such revised returns in each particular previous year, may be correct or not, but then, there may be cases, where there may be foolproof material to show, that the assets found during search, and disclosed under Section 132(4), were acquired by the assessee during a particular past previous year. For instance, let us take an example, that in case of a search, Fixed Deposit receipts and/or Pass Books of undisclosed bank accounts are found, discloser whereof has been made by the assessee under Section 132(4). Obviously, the dates of the Fixed Deposit receipts, and the entries of the receipts as appearing in the bank Pass Books are the foolproof material to show, that the assessee had acquired those assets at the time it purports to have been acquired, as appearing from those documents, or at any earlier point of time. In that event, the assessee cannot be said to be under any obligation, or even rather entitled, to submit return, with respect to that income, in any past or future previous year, simply because, he may have deposed in the statement given under Section 132(4), that he will show that income in the return of any particular assessment year, at the pain of the immunity conferred by clause (2) of Explanation 5 being taken away.

The above illustration clearly demonstrates, that the assessee is rather under obligation to submit return with respect to the income, from which the undisclosed assets have been acquired, as disclosed under Section 132 (4), in the returns of the relevant previous years only.

Examining the present case from that standpoint, it is clear, that the Assessing Authority has made assessment for the 5 assessment years, and instead of believing the returns filed by the assessee, the Assessing Authority, as a fact, had found the income to be relating to different assessment years, in different volumes, as contra-distinguished to the one submitted by the assessee, and has accordingly made the assessments, which assessments had become final, and are not subject matter of challenge. That being the position, in our view, it cannot be said, that the immunity conferred by clause (2) of Explanation 5, consequent upon the assessee giving statement under Section 132(4), was at all taken away, or even watered down.

Thus, the questions framed in the two appeals are answered against the revenue, and in favour of the assessee, and the impugned orders of the learned Tribunal are maintained.

Both the appeals are, accordingly, dismissed.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.